OVERSIGHT HEARING
"Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse"

House Committee on the Judiciary

June 22, 2004
Room 2141 Rayburn House Office Building
10:00 a.m. - 12:00 p.m.

Uncertain and Certain Litigation Abuses

Prepared Testimony of:
Theodore Eisenberg
Henry Allen Mark Professor of Law
Cornell University
Draft of June 20, 2004

I am a professor at Cornell Law School and a biographical sketch is appended at the end of this prepared testimony. I will address several issues raised by the instant hearings. My conclusions are summarized as follows:

Summary of Testimony

● Tort reform proposals are based on questionable views of the operation of the tort system. The United States is not the most litigious country, tort awards are not increasing, punitive damages are rare and in line with compensatory awards.

● Estimates of tort system costs supplied to Congress and the media are deeply flawed and provide no basis for sound policymaking.

● A fee-shifting experiment in the past was quickly repealed at the behest of the very defense group that proposed them.

● Rule 11's experiment with fee-shifting revealed the tort system to have a low rate of abuse compared to other areas of law and fell particularly hard on civil rights claimants.

● Both anecdotal evidence and systematic evidence indicate that removal abuse by state court defendants is a growing problem for federal courts. Wrongful and abusive removal increases the costs to plaintiffs and defendants while unduly delaying adjudication.

I. Myths About the American Legal System

The title of these hearings, the sound-byte missives circulated among members of Congress, and some proposed reforms suggest definite beliefs about the state of civil litigation in the United States. The picture is one of an overly litigious society, with large and ever-increasing damages awards. The picture has rather little to do with what serious empirical scholarship about the legal system shows. The United States is far less litigious than is commonly believed and neither tort awards nor class action awards are constantly increasing.

A. Litigiousness

The United States is not so litigious as most people believe. Professor Patricia Danzon and colleagues found that "at most 1 in 10 negligent injuries results in a claim."[1] Professor Deborah Hensler and colleagues report a low rate of claiming for various accident types.[2] The Harvard Medical Practice Study estimates "that eight times as many patients suffer an jury from medical negligence as there are malpractice claims."[3]

In overall litigiousness, the United States is far from the leading countries. Professor Kritzer provides a useful summary of the evidence:

> On the litigiousness issue itself, patterns are not as clear as the popular perception might suggest. In his study of law and disputes in Morocco, Lawrence Rosen observed that "one seldom meets an American who has been involved in an actual lawsuit and almost no Moroccan who has not." My own comparative work on propensity to sue suggests that broad statements about differences in propensity have to be conditioned by the type of issue involved. While it may be the case that persons in the United States are more likely to bring claims and suits for personal injury, Britons may be equally likely to seek redress for consumer problems and perhaps more likely to pursue claims related to employment and rental residences. Finally, the most comprehensive effort to compile cross-national data on litigation rates [see Table 1] shows that the United

[1] Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and Public Policy 23-24 (1985).

[2] Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth G. Lewis, E. Allen Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski & Mary E. Vaiana, Compensation for Accidental Injuries in the United States 121 (1991).

[3] Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York 7-1 (1990) .

States is not the most litigious nation, nor is the United States all that different from England and Wales.[4]

Table 1. Cases Filed Per 1,000 of Population

Country	Cases per 1,000 Population
Germany	123.2
Sweden	111.2
Israel	96.8
Austria	95.9
U.S.A.	74.5
UK/England & Wales	64.4
Denmark	62.5
Hungary	52.4
Portugal	40.7
France	40.3

Source. Christian Wollschlager, Exploring Global Landscapes of Litigation Rates, in Soziologie des Rechts: Festschrift fur Erhard Blankenburg zum 60. Geburtstag 587-88 (Jurgen Brand and Dieter Strempel eds., 1998).

To the extent tort reform proposals are based on some notion that the United States is markedly more litigious than other leading industrialized countries, the empirical evidence does not support tort reform.

B. Award Trends

Some premise tort reform on the need to control perceived ever-increasing tort awards. But empirical studies of litigation undermine this questionable perception.

Nicholas Pace, Seth Seabury, and Robert Reville of the RAND Institute for Civil Justice used data assembled by RAND to study the long-term trend in tort awards in the two major locales for which such data were available–San Francisco and Cook County. They reached a remarkable conclusion, published in the first issue of the *Journal of Empirical Legal Studies*. Tort awards over a 40 year period had increased *less* than real income. They wrote:

> Our results are striking. Not only do we show that real average awards have grown by less than real income over the 40 years in our sample, we also find that essentially all of this growth can be explained by changes in observable case characteristics and claimed economic losses

[4] Herbert M. Kritzer, Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?, 80 Tex. L. Rev. 1943, 1981 (2002).

> (particularly claimed medical costs). However, focusing on the average award masks considerable heterogeneity in the growth rates for different kinds of cases. In particular, we find that the average award in automobile cases declined after controlling for claimed medical costs, offsetting persistent and unexplained growth in the average awards for other tort cases. *In general, though, the growth (or decline) does not appear substantial enough to support claims of radically changing jury behavior over the past 40 years.* Rising claimed medical costs appear to be one of the most important factors driving increases injury verdicts.[5]

In April 2004, the Bureau of Justice Statistics issued a report on trial outcomes in 2001 for 46 of the largest counties in the United States. The vast majority of the counties in the 2001 data were the object of a similar BJS study covering fiscal year 1992 and calendar year 1996. The BJS found that, in real dollars, median tort awards had substantially declined since 1992.[6] The median total award was $33,000. The study's findings are consistent with the major time-trend findings by the RAND researchers. A study of class actions, also published in the *Journal of Empirical Legal Studies*, found no evidence that class recoveries have increased over the last decade.[7]

C. Punitive Damages

Social scientific study of punitive damages since the 1980s reveals a pattern of rational jury decisions. The social science consensus is that, with rare exceptions, the system operates reasonably.

1. Juries Rarely Award Punitive Damages But Do So More Frequently in Intentional Tort Cases

Juries infrequently award punitive damages. This is the consistent finding of more than a dozen studies of jury punitive damages awards in actual cases, including several multistate studies by government agencies (the U.S. Justice Department's Bureau of Justice

---

[5] Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, Forty Years of Civil Jury Verdicts, 1 J. Empirical Leg. Stud. 1, 3 (2004) (emphasis added).

[6] Bureau of Justice Statistics, Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004).

[7] Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Leg. Stud. 27 (2004).

Statistics ("BJS") in 2004, 2000, and 1995[8] and the U.S. General Accounting Office ("GAO")),[9] by prestigious, non-partisan research institutions (the American Bar Foundation [10]and the RAND Institute of Civil Justice),[11] by Judge Richard Posner and Professor William Landes,[12] and others.[13] The infrequency of punitive awards is also a principal finding of five individual state and county level studies.[14]

---

[8] BJS 2004, supra note 6; U.S. Dept. of Justice BJS Bulletin, Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties (1996), p. 1 (August 2000) (about three percent of plaintiff winners in tort trials were awarded punitive damages; median award was $38,000); BJS Special Report, Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995), p.1 (about six percent of plaintiff winners received a punitive award; median award was $50,000).

[9] U.S. GAO, Product Liability Verdicts and Case Resolution in Five States, GAO/HRD-89-90 (Sept. 1989) 24, 29 (punitive damages awarded in 23 of 305 cases decided in five states).

[10] Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 214 (1995) ("punitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards").

[11] James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation 27 (RAND 1988) ("punitive damages were not paid on any of the 2,198 closed cases"); Erik Moller, Trends in Civil Jury Verdicts Since 1985 33 (RAND 1996) ("punitive damages are awarded very rarely"); Mark Peterson, Syam Sarma & Michael Shanley, Punitive Damages: Empirical Findings 10 (RAND 1987) (fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984).

[12] William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 304-07 (1987) ("insignificance of punitive damages in our sample is evidence that they are not being routinely awarded").

[13] Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) [hereinafter "Eisenberg et al., Juries & Judges"]; Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 Justice System J. 21 (1993); Michael Rustad & Thomas Koenig, Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters," 47 Rutgers L. Rev. 975, 981-92 (1995) [hereinafter "Rustad & Koenig, Reconceptualizing"] (punitive damages rarely awarded in medical malpractice cases).

[14] For example, a recent Georgia study concludes, "punitive damages currently are not a significant factor in personal injury litigation in Georgia." Thomas A. Eaton et al., Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s, 34 Ga. L. Rev. 1049, 1094 (2000). A Florida study finds the frequency of punitive damages awards to be "strikingly low." Neil Vidmar & Mary R. Rose, Punitive Damages by Juries in Florida: In Terrorem and in Reality, 38 Harv. J. Legis. 487, 487 (2001). See also Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1 (1990) (two counties); Deborah Jones Merritt & Kathryn Ann Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 Ohio St. L.J. 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, Medical Malpractice and the American Jury 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases).

These empirical studies of actual cases further show that juries award punitive damages especially rarely in products liability and medical malpractice cases. In contrast, juries award punitive damages more frequently in intentional tort cases. That is both appropriate and expected because, as Professor Cass R. Sunstein (the lead author of the recently published compilation of some of the key Exxon-funded research articles[15]) and numerous other scholars have noted, intentional torts merit greater punishment than unintentional torts and thus "provide particularly appropriate cases for punitive damages awards." [16] In summary, a broad social science consensus shows "a picture of reality quite different than the one portrayed" in tort reform proponents discussions.[17]

2. Punitive Damages Awards Strongly Correlate With Compensatory Awards

On the infrequent occasions when juries do award punitive damages, the overwhelming evidence is that most such awards strongly correlate with compensatory damages in the same case. BJS data, GAO data, RAND data, and other data all reveal this correlation.

3. Independent Reviews of Punitive Awards Find Them to Have Been Appropriately Awarded

Independent analysts who review individual cases of punitive damages rarely find such damages to have been inappropriately awarded. Rustad and Koenig reviewed hundreds of medical malpractice cases covering three decades and concluded that "punitive damages were awarded in only the most egregious cases involving healthcare practitioners."[18] These egregious cases not infrequently involve sexual contact between medical providers and their patients, including "predatory sexual assaults and abuses of transference techniques by medical personnel." [19]

Judge Posner and Professor Landes reached a similar conclusion after reviewing actual products liability punitive awards. They found "evidence of gross negligence or

---

[15] Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, Punitive Damages: How Juries Decide (2002).

[16] Cass R. Sunstein et al., Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2084 (1998). See, e.g., Landes & Posner, supra note 12, at 209; A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 909 n.120 (1998) .

[17] Daniels & Martin, supra note 10, at 238.

[18] Rustad & Koenig, Reconceptualizing, supra note 13, at 1027.

[19] Id. at 1034-35 (footnotes omitted).

recklessness is plain" in eleven of thirteen cases surveyed[20] and concluded that "the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages."[21] Eisenberg et al., reviewing the most "disproportionate" punitive awards in the BJS data, found the awards to be warranted.[22] Thus, "extreme" awards should be studied and not simply dismissed as pathological: "[f]ollow-up study of the most extreme punitive-compensatory ratios suggests the distortion introduced by relying on extreme awards without further inquiry."[23] Merely relying on headline-grabbing awards, without follow-up, to portray juries as erratic is not scientifically defensible.

II. Questionable Estimates of the Cost of the Tort System

Congress and the media are regularly supplied with estimates of the cost of the tort system. Two recent reports (the "*Tort Cost Reports*") seem to have strong publicity campaigns.[24] But these reports provide no basis for sound congressional policymaking. Since the *Tort Cost Reports* make no effort to quantify the benefits of the tort system, it is impossible for rational policymakers to act on the basis of the reports' analyses even if its analysis of costs were correct. Even without considering the benefits of the tort system, however, the reports' analysis of the tort system's costs is sufficiently questionable to preclude reliance on them by Congress. The reports attribute a wide range of insurance costs fully to the tort system, mischaracterize what should count as true economic costs, and fail to account at all for the tort system's benefits.

A. The Unstated Premise: Tort Reform Will Reduce Insurance Rates

Perhaps most importantly, one of the *Tort Cost Reports*, that by Pendell and Hinton, bases its estimates of the tort system's costs in part on the cost of insurance premiums.[25] Yet the report provides no insight into the relation between the insurance industry's investment cycle and insurance premium costs. It is well known that insurance premiums

---

[20] Landes & Posner, supra note 12, at 185.

[21] Id.

[22] Eisenberg et al., Juries & Judges, supra note 13, at 756.

[23] Id. at 755-56 (footnote omitted). For example, one case involved sexual abuse of a child by a sports coach. Similar examples were found by Vidmar & Rose, supra note 14, at 500-05.

[24] Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update; Judith W. Pendell & Paul J. Hinton, Liability Costs for Small Business.

[25] Pendell & Hinton, supra note 24, at 9.

respond in part to the yield on insurance companies' investments. In periods of declining interest rates, premiums may increase to offset reduced investment yields. The key point is that insurance premiums can increase for reasons other than increased loss claims. By measuring tort costs through insurance premiums, Pendell and Hinton are assigning to the tort system costs that need to be differently accounted for.

This is especially important because the *Tort Cost Reports* are interpreted by some to mean that tort reform promises reduced insurance rates. As noted, insurance rates fluctuate with investment yields. And, although some evidence links tort reform and declining insurance rates,[26] one also has reason to be skeptical.[27] For example, when Florida's insurance industry was offered a legislative package in which tort reform would be tied to forced reductions in insurance rates, it claimed that the tort reform law would reduce general liability insurance premiums by only one percent.[28] My study of tort reform provisions with Professor James Henderson shows little linkage between fort reform laws and declining awards.[29] And in the midst of yet another insurance crisis atmosphere, the director of government affairs for the Risk and Insurance Management Society, which generally supports tort reform, expressed concern about linking an insurance availability crisis and tort reform legislation.[30]

B. Erroneously Attributing Insurance Payments to the Tort System

Pendell and Hinton attribute all insurance payments from a range of lines of insurance to the tort system. This approach assumes that all payouts under the insurance lines studied are attributable to the tort system. Under this view, no business or person would purchase insurance absent the tort system. This is questionable. The single largest component of tort system awards is automobile cases, which account for an astonishing 61

---

[26] Blackmon & Zeckhauser, State Tort Reform Legislation: Assessing Our Control of Risks, in Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare 272 (P. Schuck ed. 1991); Moore, Premium Problem, Nat'l L. J., Feb. 14, 1987, at 366, 368 (significant tort reform reduced insurance rates).

[27] Kriz, Liability Lobbying, Nat'l J., Jan. 23, 1988, at 191, 192 (insurance officials say tort reform will not lower insurance rates); Moore, supra note 26, at 368 (When reform statutes were enacted, states wanted to know what rate reductions to expect. Insurers' answers were "at best incomprehensible and were never accompanied by any data."). Given the dominance of asbestos cases in products litigation, it would be helpful to see insurance company losses, volume, premiums, and profits stated with and without their asbestos experience.

[28] Moore, supra note 26, at 368.

[29] Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731-810 (1992) (figures 12, 13)

[30] Wasilewski, Tort Reform: Courting Public Opinion, 87 Best's Rev. Prop.-Casualty Ins. ed., June 1986.

percent of the total compensation paid in all tort claims, with and without lawsuits.[31] States *require* that drivers be insured. They do not require such insurance simply because a tort system exists. They require it primarily so that losses will be compensated, whether or not lawsuits are filed. Indeed, in the automobile field, two-thirds of the compensation paid is paid without the filing of a lawsuit.[32] To attribute this massive component of insurance payments to the tort system is questionable. There will be automobile insurance, or some similar mechanism with substantial costs, whether or not tort reform occurs.

Erroneously attributing the single largest component of insurance payouts to the tort system undermines the *Tort Cost Reports* accounting in another important respect. The reports attributes all insurance company overhead to the tort system. Yet the tort system is obviously not responsible for much of that overhead. There would be insurance companies without the tort system. This overhead charge to the tort system comprises about one-fifth to one-quarter of the tort cost estimates. Somehow the tort system is to be held responsible for the full compensation of insurance executives, many of whom would have to be paid even if the tort system were radically changed.

C. Misunderstanding the Tort System's Costs

The *Tort Cost Reports* cannot purport to be an accurate assessment of the tort system's costs because they treat all tort payments as costs to society. The substantial portion of every payment that goes to compensate losses is not a cost to society. It is a transfer payment by or on behalf of a wrongdoer to the victim. If a criminal defendant makes a restitution payment to a victim, no one would think of labeling that as a cost to society. The payment simply makes whole the loss to the victim. If a tortfeasor pays a wrongfully injured victim, that is not a cost to society. Nor is it viewed as a gain to the victim. Simple personal injury recoveries are not even taxed. There has been no accretion to wealth. Professor Marc Galanter has pointed out that "a significant portion of the wealth that flows through the litigation system is delivered to creditors and wronged parties who are entitled to compensation under the existing rules."[33]

Other studies suggest that liability insurance costs are modest. According to one study, the cost of products liability insurance premiums in 1993 was 13.5 cents per $100 of retail sales, a nearly 50 percent reduction from 25.9 cents in 1987.[34] A 1995 study of U.S. corporations found that total liability costs comprised 0.255% of total revenue or 25.5

---

[31] James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation 36 (RAND 1986).

[32] Id.

[33] Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 U. Md. L. Rev. 1093, 1141-42 (1996).

[34] J. Robert Hunter, Product Liability Insurance Experience 1984-1993: A Report of the Insurance Group of the Consumer Federation of America (1995) (Exhibit A, col. N).

cents of every $100 dollars of revenue. The National Association of Insurance Commissioners similarly found that liability costs constituted 0.16% of retail sales in 1995.[35]

D. The Failure to Account for the Benefits of the Tort System

While clearly getting the costs of the system wrong, the *Tort Cost Reports* do not even bother addressing the benefits of the tort system. While difficult to quantify, such benefits undoubtedly exist and are widely recognized.

American products thrive in international markets in part because of their reputation for quality and safety. That reputation is a consequence of many factors, including the legal environment in which American companies operate. That environment includes the deterrent effect of the American tort system. The system discourages negligent behavior and filters out unsafe products. Conservative law-and-economics scholar and federal appellate Judge Richard Posner has noted that although "there has been little systematic study of the deterrent effects of tort law, . . . what empirical evidence there is indicates that tort law likewise deters."[36]

Automobile Safety. Automobile safety is especially important because of the number of automobile accidents and the dominance of automobile cases in the tort system. Consumers have clearly seen tort-related safety benefits in the automobile industry. The tort system, coupled with consumer safety efforts and increased regulation, has led to the withdrawal of unsafe cars, such as the Corvair, and to the development, and subsequent improvement, of new safety devices.

In analyzing the impact of products liability on automobile safety, John D. Graham of Harvard University found that, while liability was not the sole factor leading to safety improvements in cars, it may act as a catalyst and quicken the process "and sometimes result in more rapid safety improvements than would occur in the absence of liability."[37] Graham notes, for instance, that "the installation of rear-seat shoulder belts and the phaseout of belt tension relievers may have been hastened by liability considerations."[38] Liability risk may have been enough to spark safety improvements even when other important factors, such as consumer demand, regulation, and professional responsibility,

---

[35] Daniel J. Capra, "An Accident and a Dream": Misinformation, Misstatement, and Misunderstandings About the Civil Justice System 6 (Jan. 29, 1999) (An independent study prepared for the New York State Bar Association).

[36] Landes & Posner, supra note 12, at10.

[37] John D. Graham, Product Liability and Motor Vehicle Safety, in Peter W. Huber & Robert E. Litan, eds., The Liability Maze: The Impact of Liability Law on Safety and Innovation 119, 181 (Brookings Inst. 1991).

[38] Id. at 181.

were not on their own sufficient.[39] Graham documents that liability considerations were a sufficient condition or a contributing factor to at least fourteen important auto safety improvements, including inadvertent vehicle movement, fuel tank design, occupant restraints, and all-terrain vehicle restrictions.[40]

Graham also finds that liability concerns do not impose an undue financial burden on manufacturers. The cost of liability was not all that important to industry: "The direct financial costs of liability are usually a relatively minor factor, at least from the perspective of large manufacturers."[41] Manufacturers are much more fearful of the adverse publicity that accompanies product liability suits, which may lessen consumer demand for unsafe products.[42]

Other Industries. The chemical industry has made significant safety improvements as a result of liability exposure.[43] MIT scholars Nicholas A. Ashford and Robert F. Stone found that the tort system has not only stimulated the development of safer products and processes, but also credit it with spurring significant technological innovations that have resulted in the reduction of chemical hazards.[44] Ashford and Stone conclude that the reforms suggested by traditional tort reformers are misplaced. In the chemical industry, recoveries should be made easier not more difficult.

> [T]he recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant under deterrence in the system already exists. Thus proposals that damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease.[45]

---

[39] Id.

[40] Id.

[41] Id. at 182.

[42] Id. at 181, 182.

[43] *See* Nicholas A. Ashford & Robert F. Stone, Liability, Innovation, and Safety in the Chemical Industry, in Huber & Litan, supra note 37, at 367.

[44] Id. at 368.

[45] Id. at 419.

Another scholar, Rollin B. Johnson of Harvard University, argues that the current liability system may provide incentives for safety and innovation, and that attempts to change the system may do more harm than good:

> It would be difficult to argue that the uncertainty and unpredictability of the tort system does not affect business planning to some degree. And some risk-averse companies may decide to abandon certain lines of research and development because of concern over liability, leaving those areas open to foreign competitors. But such actions arguably increase the average safety of products, while preserving opportunities for American competitors willing to assume the risk and creating incentives for producers to innovate to make alternative and even safer products.
>
> On the whole, it is difficult to evaluate the magnitude of the disadvantages of the present system and even more difficult to weigh them against the advantages of the deterrence they provide against the introduction of truly hazardous products. Furthermore, the possibility of an occasional "excessive" award may provide greater deterrent value at lower net cost to society than universally applicable regulations do. . . . The liability system might benefit from some fine-tuning to make the system more responsive, less expensive, and more equitable. But such attempts may actually make it less effective.[46]

Johnson concludes, "The claim that the product liability system unduly compromises the chemical industry is not well supported by the evidence."[47]

Experience in the pharmaceutical industry accords with these conclusions.[48] Pharmaceutical company attorneys credit the product liability system with providing a deterrent which has, in turn, led to safety improvements. One company attorney interviewed regarded the liability crisis as largely a myth.

> "For certain classes of drugs, liability concerns have probably led to safer products, in conjunction with FDA requirements. . . . I personally don't think that the litigation threat is that serious except for DES-type products where potentially significant risks are discovered well after the drug has been introduced. I believe--though it's heretical--that the liability crisis is largely a myth when one looks at the available information such as the actual number of cases."[49]

---

[46] Rollin B. Johnson, The Impact of Liability on Innovation in the Chemical Industry, in Huber & Litan supra note 37, at 450.

[47] Id. at 452.

[48] Judith P. Swazey, Prescription Drug Safety and Product Liability, in Huber & Litan, supra note 37, at 291.

[49] Id. at 297.

Tellingly, this industry attorney concluded that tort reform proposals go way beyond what may be needed to fix the system. "Other than DES-type cases, the tort system for drug product liability 'ain't broke,' and the tort reform proposals go way beyond what is needed to fix it."[50] Another products liability attorney working for a pharmaceutical company agreed, "Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence."[51]

Risk Managers Agree That Tort Law Deters. Risk managers should have a useful perspective on whether or not tort law deters. They are responsible for reducing liability exposure for companies, associations, governments, and other organizations. In an effort to determine whether tort law deters, the late Professor Gary Schwartz of UCLA Law School interviewed risk managers for several public agencies in California, including managers from a city, the state motor vehicle department, and the UCLA Medical Center. He asked them about the impact of liability on their safety efforts, or whether the impetus to improve safety was simply a desire to do the right thing. He found that "[a]ll of them emphasized that their efforts were due to the combination of both. A risk manager starts with the idea that accident avoidance is a good for its own sake. But the prospect of tort liability provides an important reinforcement as well as an essential way to sell the risk manager's proposals to others in the organization."[52] In fact, this need to sell to others in an organization itself can be a function of the search for cost savings. As one Los Angeles city manager explained to Schwartz, "officials are not much affected by abstract appeals to safety. Indeed, funding will generally be denied 'unless we can tie it in to cost savings for the City.'"[53] Schwartz found that one risk manager started his job with considerable skepticism over whether the tort system effectively deterred, but his job experiences led him to believe that "tort liability exerts a significant influence."[54]

Similar results were obtained in a survey of risk managers for major corporations by the business-oriented Conference Board, which "found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial."[55] The survey noted that, of 232 major corporations, concerns about products liability encouraged approximately twenty-two percent to improve manufacturing procedures, thirty-two percent to improve the safety design of products, and

---

[50] Id.

[51] Id.

[52] Gary Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 415-416 (1994).

[53] Id. at 416 n. 196.

[54] Id. at 416.

[55] Id. at 409.

thirty-seven percent to improve labeling."[56] The appearance of the first survey, which countered tort reformers' arguments that the liability system was ruining American businesses, prompted a second survey of 2,000 corporate CEOs, a third of whom, despite decrying the anticipated effects of the tort system and having a self-interest in promoting tort reform, admitted that they had improved the safety of products and nearly one-half of whom improved their product warnings.[57]

Schwartz himself attempted a cost-benefit analysis of tort liability, focusing on the medical malpractice system. By comparing the cost of medical malpractice insurance and the estimated cost of practice changes due to liability, with the Harvard study estimate that the malpractice system reduces medical injuries by eleven percent and the number of medically negligent injuries by twenty-nine percent, Schwartz concluded,

> Given the $130 billion total for actual medical injuries in 1984, the malpractice system can be understood as having reduced the cost of injuries by $19.5 billion. Since this estimated safety benefit is considerably higher that the $15 billion estimated costs of the medical malpractice regime, that regime seems to have been cost justified.[58]

The empirical evidence thus demonstrates substantial benefits that outweigh the costs that may legitimately be charged to the tort system. A sober, business-oriented magazine published abroad voices envy of the American system. *The Economist* has observed:

> So much fury is leveled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly.[59]

E. The *Tort Cost Reports* Fail to Reconcile Their Inflated Estimates of the Tort System's Costs with More Sober Estimates

It takes no economic training to recognize that the *Tort Cost Reports* failure to account for the benefits of the tort system is questionable. But even on the incredible assumption that one can focus only on costs, the *Tort Cost Reports* fail to test the figures most essential to their analysis, their estimates of the cost of the tort system. In particular,

---

[56] Id. at 408-09.

[57] Id. at 409.

[58] Id. at 440.

[59] The Way Those Crazy Americans Do It, The Economist, Jan. 14, 1995, at 29 (British ed.).

they fail to explain why their figures differ so drastically from figures used by more neutral observers.

Reconciling the *Tort Cost Reports'* figures with one notable study of the tort system is especially important. In 1986 the RAND's Institute for Civil Justice published a more refined estimate of national tort system costs. Unlike the *Tort Cost Reports*, the RAND researchers actually studied tort litigation payments. And they used two complementary methods to estimate tort litigation payments. One method rested on insurance industry data; the other on individual lawsuit survey data.[60] The researchers, Kakalik and Pace, noted that the two different methods of estimation of litigation payments yielded similar results. Excluding automobile torts, nationwide in 1985, they estimated the total compensation paid in all tort claims with and without lawsuits to be $17.4 billion in 1984 dollars.[61] The RAND researchers estimated national expenditures for tort litigation in 1985 to be $29 to $36 billion.[62] One of the *Tort Cost Reports* estimates of tort expenditures for 1985 is $83.7 billion,[63] approximately three times the methodologically more precise RAND estimate.

Why the vastly different estimates? The *Tort Cost Reports* took into account no actual aspects of tort litigation; they look only to external measures of costs, such as insurance payments. The basic flaws in this methodology are described above. In contrast, the RAND study actually studied the tort system.

Furthermore, the RAND study reveals what the *Tort Cost Reports* mask–of the total expenditures in the tort system, a large fraction constitute reimbursement for losses, not true economic costs. Well over half the amounts transferred, 56 percent, constitute payments to injured victims.[64] The true costs of the tort system, are a small fraction of the *Tort Cost Reports* estimates and likely are outweighed by the benefits the *Tort Cost Reports* ignore.

III. Uncertain Effect of Reallocating Attorney Fees; Loser Pay Rules

To the extent, H.R. 4430 builds on the theme of a losing party having to pay attorney fees, Congress should know about how such rules have fared in the past in the United States.

---

[60] Id. at 35.

[61] Kakalik & Pace, supra note 31, at 36 (Table 3.5).

[62] Kakalik & Pace, supra note 31.

[63] Tillinghast-Towers Perrin, supra note 24, at Appendix 1a, p. 1.

[64] Kakalik & Pace, supra note 31, at 70.

A. U.S. Experience with Fee-Shifting

Florida. In an earlier period of purported tort crisis, the Florida legislature was persuaded to adopt (but later repeal) fee-shifting in medical malpractice cases. Economists Edward Snyder and James Hughes studied cases disposed of before, during, and after applying fee-shifting to Florida medical malpractice cases in the 1970s and 1980s.[65] The studies covered about ten years of medical malpractice cases and include over 25,000 cases. The samples included substantial numbers of cases (about 50%) subject to the fee-shifting rule and substantial number of cases not subject to the fee-shifting rule. The authors found several interesting effects, including that the average settlement was higher and the average defense cost was higher under the fee-shifting rule.[66] But perhaps of greater immediate interest is the fate of the legislative experiment with fee-shifting. It was "the Florida Medical Association, which had backed the adoption of the English [fee-shifting] Rule, that ultimately sought its repeal, partly because of early cases awarding the full contingency fee percentage to the plaintiff as the fee shift, and partly because the defendants came to realize the difficulty in collecting the shifted fee when the plaintiff had no resources from which to pay it."[67]

Alaska. With certain exceptions and limitations, Alaska's Civil Rule 82 entitles a prevailing party to partial compensation for attorney's fees from the loser.[68] In 1994, the Alaska Judicial Council studied the effect of Rule 82. The study yielded no firm conclusions about the effect of fee-shifting on filings. The rate of tort filings in Alaska did not seem materially different from those in states without fee-shifting.[69] In Alaska's largest population center, Anchorage, the Judicial Council found a higher rate of tort cases going to trial, but it is not clear that this increase was attributable to fee-shifting.[70]

---

[65] Edward A. Snyder & James W. Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J.L. Econ. & Org. 345 (1990) [hereinafter Snyder & Hughes, The English Rule]; James W. Hughes & Edward A. Snyder, Litigation and Settlement Under the English and American Rules: Theory and Evidence, 38 J.L. & Econ. 225 (1995) [hereinafter Hughes & Snyder, Litigation and Settlement].

[66] Hughes & Snyder, Litigation and Settlement, supra note 65, at 243-44.

[67] Kritzer, supra note 4, at 1950, discussing Snyder & Hughes, The English Rule, supra note 65, at 356.

[68] Alaska Civ. R. 82 (2002).

[69] Susanne Di Pietro et al., Alaska Judicial Council, Alaska's English Rule Attorney's Fee Shifting in Civil Cases (1995) [hereinafter Alaska's English Rule]; Susanne Di Pietro, The English Rule at Work in Alaska, 80 Judicature 88 (1996).

[70] Alaska's English Rule, supra note 69, at 138 (finding that the rule "seldom plays a significant role in civil litigation").

The Alaska experience revealed some surprises. As summarized by Professor Herbert Kritzer:

> One surprising finding was that fee awards were made in only about one-half of the state cases surveyed and one-quarter of the federal diversity cases where they were authorized by Rule 82. A partial explanation for this infrequency might have been the existence of post-judgment settlements in which the prevailing party agreed to forego a fee award in return for the losing party's agreement not to file an appeal. A second surprise was that only a small portion of fee awards came in tort cases.[71]

The Alaska study also explored the effect of Rule 82 on filing rates, settlements, and litigation by interviewing attorneys and judges, which provided information on the perceptions of these actors. The interviews yielded some surprising results. For example, as summarized by Kritzer, "only thirty-five percent of the attorneys could recall even a single instance in which Rule 82 played a significant role in a prospective client's decision not to file a suit or assert a claim."[72] This effect may be consistent with Florida's aborted experiment with fee-shifting. Many individuals are not sufficiently wealthy to make them worth pursuing for fees after a loss. And a court is unlikely to make a substantial fee-shifting award against individuals of modest means. So the downside when such a person brings an unsuccessful lawsuit may not be materially affected by the risk of having to pay attorney fees. If the "average" plaintiff is not amenable to a fee-shifting award, and the average defendant is, the effect of fee-shifting is likely to be to increase costs to the very defendants sought to be assisted by the fee-shifting rule. Rather than having the plaintiff's attorney's fee come out of the plaintiff's recovery, the fee is an added cost for the defendant. This effect is consistent with one Alaska defense attorney's comment, "It's just an extra ten percent added to the amount my client will pay in the end."[73]

Each interviewed Alaska attorney was asked whether Rule 82 affected their settlement strategy in two recent cases. Only about one-third reported an effect on settlement strategy. Rule 82 increased the value of plaintiff's claim when only damages was at issue and liability was clear. To the defendants, the Rule sometimes increased plaintiff's claim beyond the face amount of the insurance policy. A plaintiff's attorney recalled several instances in which clients with strong claims settled for less than the value

---

[71] Kritzer, supra note 4, at 1951 (footnotes omitted).

[72] Id. at 1952.

[73] Alaska's English Rule, supra note 69, at 110-11.

of their claims due to Rule 82 concerns.[74] Defense lawyers believed that the threat of a Rule 82 induced plaintiffs with weak cases to accept early settlement offers.[75]

The key to Rule 82's effect thus seem to be plaintiff assets and perceived strength of claims. Attorneys believed that Rule 82 enhanced their positions when their clients had strong cases; but the dominance of low-asset plaintiffs may have produced a net diminution in defendants' positions.

Federal Civil Rights Cases. One empirical study assessed modern experience with Congress changing statutory incentives in an important, widely used, civil rights law.[76] In 1976 Congress enacted the Civil Rights Attorneys Fees Award Act.[77] It provided for attorney fees for the prevailing party in cases brought under section 1983, section 1981 and other non-Title VII federal civil rights statutes. Experience with the effect of the statute suggests congressional humility in forecasting the effect of tinkering with attorney fees. At the time of the 1976 Act's adoption, some feared that it would lead to a flood of new civil rights claims. Indeed, some observers, including Supreme Court justices, pronounced that the fee-shifting statute led to many new claims.

Yet the available evidence does not support the theory that enactment of the fee-shifting statute opened the floodgates. As Figure 1 shows, after enactment of the fee-shifting statute the rate of growth in nonprisoner civil rights cases looks little different from the rate of growth in all other federal civil cases. In most years civil rights filings increased at a slower rate than other filings. In total, from 1975 to 1984, other filings increased 125% and civil rights filings covered by the fee-shifting statute increased only 94%, a relative *decline* of 31%. The feared flood of litigation never occurred. Changes in section 1983 doctrine and constitutional law during the relevant period led us to conclude that the decline probably is not attributable to a legal climate that became substantially less hospitable to civil rights claims during the period studied.[78]

---

[74] Id. at 111.

[75] Id. at 112-13.

[76] Theodore Eisenberg & Stewart Schwab, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719 (1988). The discussion of civil rights cases is based on my prior congressional testimony, "Civil Rights Act of 1990: Hearings on H.R. 4000 Before a Joint House Comm. on Education and Labor and the Judiciary," 101st Cong. 2d Sess. (March 13, 1990).

[77] 42 U.S.C. § 1988.

[78] Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641 (1987).

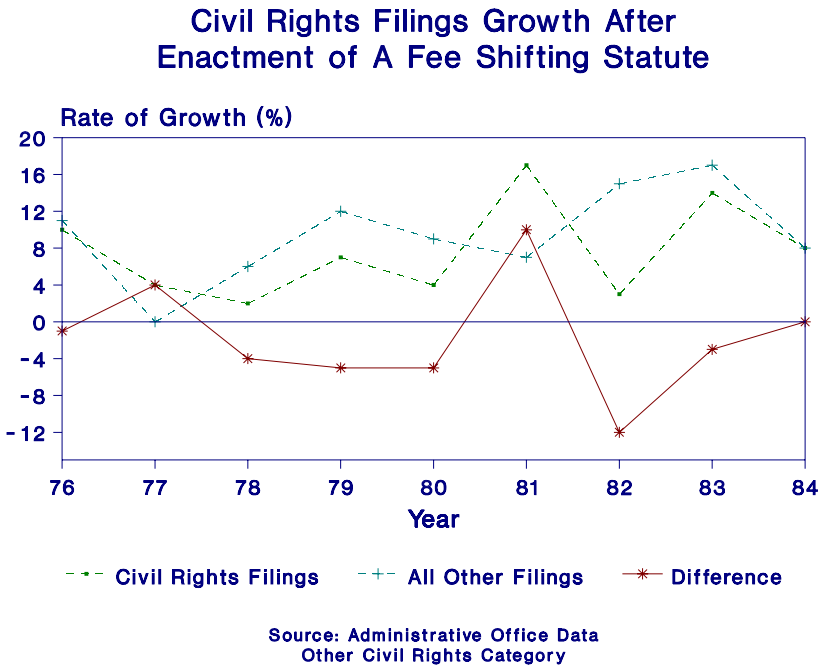

Figure 1

B. Rule 68-Like Proposals

Under the existing version of Rule 68, parties can put the opposing party at risk for certain costs by making a formal settlement offer. As I understand proposed H.R. 4430, attorneys' fees would effectively be added to these costs. Preliminarily, such a fee-shifting rule might be expected to generate effects similar to loser-pays type fee-shifting discussed above. Judgment-proof plaintiffs cannot be expected to pay fees, and judges are unlikely to order them to do so. Business plaintiffs and defendants, on the other hand, as experience with attorney fee-shifting in Florida and Alaska suggests, may well be ordered to pay fees when their opponents prevail. The net effect may be precisely the kind of counterrevolution observed in the Florida medical malpractice experiment.

Although quite tentative, experimental evidence confirms this as a likely effect. Professor Kritzer reports that two studies have examined the potential impact of attorney fee-shifting in the context of settlement offers under Rule 68.[79] Both studies include an

[79] Kritzer, supra note 4, at 1958. The studies are summarized in Thomas D. Rowe, Jr. & David A. Anderson, Empirical Research on the Success of Settlement Devices, in Dispute Resolution: Bridging the Settlement Gap (David A. Anderson ed., 1996). The studies are: Thomas D. Rowe, Jr. & Neil Vidmar, Empirical

attorney fee-shifting rule into offers of settlement such as Rule 68. Both studies suggest that such a rule increased the maximum amount that defendants are willing to pay and decreased the minimum amount that plaintiffs were willing to accept. In the real world, with fewer than plaintiffs than defendants fearful of attorney fee awards, one might expect the defendant increases to hold firm, while the plaintiff decreases might be more likely not to be realized.

IV. The Effect of Fee-Shifting Under Rule 11

The 1983 version of the Federal Rules of Civil Procedure included a fee-shifting element. Rule 11 provided that lawyers who filed cases or motions that were too weak could be sanctioned by the court.[80] The sanction was commonly calculated to include fees incurred by the opposing party to respond to the weak case or motion. The sanction amount was payable to the aggrieved party. A congress considering fee-shifting and Rule 11 should be aware of how the 1983 rule functioned. The 1983 version of Rule 11 was "very controversial"[81] and was modified in 1993 to eliminate the fee-shifting component.

Given the tort reform focus of these hearings, perhaps most important is the actual operation of the pre-1993 Rule 11. A principal concern about the Rule was its disproportionate effect on civil rights cases. Table 2 is based on a leading study of Rule 11 by Professor Marshall et al.[82] The table shows the four types of cases that account for the largest number of civil cases filed in federal court (excluding prisoner petitions and government collection cases). It shows that they also account for the largest share of Rule 11 activity. The researchers found that the most interesting findings related "to the frequency of civil rights cases as compared to other types of cases. Although civil rights cases made up 11.4% of federal cases filed, our survey shows that 22.7% of the cases in which sanctions had been imposed were civil rights cases."[83]

Research on Offers of Settlement: A Preliminary Report, Law & Contemp. Probs., Autumn 1988, at 13 and David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71 Chi.-Kent L. Rev. 519, 520 (1995).

[80] Fed. R. Civ. P. 11 (1983) (repealed 1993).

[81] Kritzer, supra note 4, at 1954. Kritzer reports the following illustrations of this controversy: Lawrence M. Grosberg, Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11, 32 Vill. L. Rev. 575 (1987); Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 Minn. L. Rev. 793 (1991); Judith A. McMorrow, Rule 11 and Federalizing Lawyer Ethics, 1991 BYU L. Rev. 959 (1991); Georgene M. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1989).

[82] Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992).

[83] Id. at 965-66.

Table 2[84]
Rule 11 Activity by Subject Area of Case

	Contracts	Other Commercial	Civil Rights	Personal Injury	N
Rule 11 sanction imposed	15.9%	18.7%	22.7%	15.1%	251
Cases filed	23.0%	9.8%	11.4%	19.2%	

Notes. The areas of law included in the table are those with the greatest Rule 11 activity. Subject areas are not necessarily exclusive (i.e. a small number of cases are counted in more than one area of law); the base of the percentages in each row is the 'n' for that row.

"Other Commercial" combines 'commercial litigation,' antitrust, 'corporations law,' banking law, insurance coverage, lender liability, securities, dealership and franchise, copyright, patents, and other intellectual property, and trademarks.

The number of cases filed is computed from data supplied by the Federal Judicial Center based on data submitted to the Administrative Office (AO) of the United States Courts; in the AO data, only one area is designated for each case. In computing percentages, prisoner petitions and government collection cases are excluded.

Of more immediate interest is the disproportionately low rate of sanctions in personal injury cases. Table 2's second row shows that personal injury cases constitute 19.2% of cases filed but its first row show that they account for only 15.1% of Rule 11 sanctions. Thus, personal injury cases were found to be the subject of abuse at a rate less than that present in other civil litigation. A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be discouraging the civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported "abuse" in an area of law, personal injury tort, found to have less abuse than other areas of law.

V. More Certain Abuses that Congress Should Address

"Tort reform" is somewhat synonymous with rule changes that favor defendants. Yet an important source of abuse for both plaintiffs and defendants' clients is abuse of the right to remove a case from state to federal court. Such removal in diversity cases is proper when the case could have been brought in federal court. But defendants' lawyers increasingly remove cases with no credible claim to federal jurisdiction. Both anecdotal evidence and systematic evidence strongly suggest that defendants are increasingly abusing the removal process. Wrongful removal increases costs to plaintiffs and defendants, and

[84] Table 2 is based on id. Table 9, at 965.

delays proceedings while simultaneously increasing fees to defendants' counsel for acts that generate deadweight economic losses to the system.

A. Documented Litigation Abuse: Instances of Abusive Defendant Removals

1. *Smith v. Life Insurance Company of Georgia*

At the anecdotal level are some genuine horror stories. Consider the case of *John Smith et al. v. Life Insurance Company of Georgia, et al.*, No. 4:04CV97, N.D. Miss. *Defendant Life Insurance Company of Georgia has wrongfully removed this case to federal court four times.* The most recent removal was during the middle of trial in a Mississippi state court.

On March 5, 2002, John Smith, Dorothy Harris, and Dorothy Williams filed suit against Life Insurance Company of Georgia ("Life of Georgia"), and its agents Willie Thomas Taylor, Jr., Billy Franklin Taylor, and Weldon Poole in the Circuit Court of Sunflower County, Mississippi. Plaintiffs asserted claims for relief under Mississippi law based on illegal conduct by Life of Georgia and its agents in the sale of insurance policies. All of the plaintiffs in the case and the agent defendants were citizens of Mississippi, thereby defeating federal diversity jurisdiction. *See* 28 U.S.C. § 1332.

Despite the absence of federal diversity jurisdiction, Life of Georgia, by August 11, 2003, had wrongfully removed the case three times on what the district judge found to be essentially the same grounds. The Court specifically found that "Defendants are filing notice of removal *for a third time* upon essentially the same grounds that this Court . . . previously rejected." *Order for Summary Remand*, No. 4:03CV330, N.D. Miss., Aug. 11, 2003. (Emphasis added).

Not content with three wrongful removals, in February, 2004, Life of Georgia engaged in further maneuvers to delay the case. It moved to sever the claims of plaintiffs Harris and Williams from those of plaintiff Smith based on alleged improper joinder under Rule 20. Mysteriously, instead of waiting for the Mississippi state trial judge to rule on its severance request, Life of Georgia sought an interlocutory appeal to the Supreme Court of Mississippi as to severance of the claims. On April 1, 2004, the Supreme Court of Mississippi granted Life of Georgia's request for an interlocutory appeal and stayed all proceedings in the Circuit Court of Sunflower County with respect to the claims of plaintiffs Harris and Williams. However, plaintiffs Harris and Williams were not immediately severed from the state court case. The Mississippi Supreme Court specifically held that the claims of plaintiff Smith were not stayed and should proceed to trial.

Consistent with the order of the Supreme Court of Mississippi, on April 2, 2004, more than two years after the the case's 2002 filing, trial began in the Circuit Court of Sunflower County on Plaintiff Smith's claims against Life of Georgia. On April 5, 2004, while the parties were selecting a jury in Mississippi state court, Life of Georgia filed a notice of removal in the United States District Court for the Northern District of

Mississippi, asserting federal jurisdiction based upon diversity of citizenship. *This was the fourth time Life of Georgia had removed the case*; in fact, after Life of Georgia's third attempt to remove the case, District Judge Pepper of the Northern District of Mississippi ordered Life of Georgia not to attempt further removals of the case.

Although the claims of plaintiffs Harris and Williams were not severed from those of plaintiff Smith, Life of Georgia's notice of removal identified the case as being solely between plaintiff Smith and Life of Georgia, and omitted any mention of the non-diverse agents. On April 6, 2004, counsel for plaintiffs requested an emergency remand. Obviously fed up with Life of Georgia's tactics, the same day, the federal district court issued a *sua sponte* remand order. *Order*, No. 4:04CV97, N.D. Miss., April 6, 2004. Meanwhile, the trial judge in the Circuit Court of Sunflower County agreed to hold the venire pool in the hope that the state court trial could be salvaged.

The following day, April 7, 2004, counsel for Life of Georgia filed an "emergency" petition for mandamus with the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit granted Life of Georgia's petition for mandamus, holding that the district court did not have authority to issue a *sua sponte* remand order. The district court subsequently entertained full briefing and oral argument on the issue. Two days after briefing and oral argument, the district court issued an order remanding the case, noting that it had been "taken aback" at Life of Georgia's aggressive removal tactics. *Memorandum Opinion*, No. 4:04CV97, N.D. Miss., May 28, 2004

Despite the district court's consistent rulings and the efforts of the state court judge to salvage the trial, Life of Georgia succeeded in derailing the state court trial of the plaintiffs. Because of Life of Georgia's dilatory tactics, the state court judge was forced to release the jury venire and plaintiffs are now forced to try to obtain another trial date on the state court's crowded docket. A case filed in 2002 was delayed for well over two years by what the federal district court regarded as abuse of the removal removal process. Well over two years after filing, and after a state court trial had been commenced, the proceeding was delayed for a fourth time.

No sane civil justice system can tolerate four wrongful removals in the same case without some system for presumptively sanctioning such behavior.

2. *Willis v. Life Insurance Company of Georgia*

In *Lucy Evon Willis et al. v. Life Insurance Company of Georgia*, No. 4:02CV65, 2002 WL 32397242 (N.D.Miss. Apr. 24, 2002), the federal district court remanded a case that had been wrongfully removed twice. The second removal was not based on any document filed in the removed case but on an exaggerated reading of a letter relating to another case. The most plausible interpretation of the defendant's behavior was that removal was being used as a delaying tactic that pushed the limits of good faith behavior. Indeed, the district court found that the letter relied on for the second removal "contains

nothing substantially different than the information contained in the complaint." *Id.* at *5.

3. The Defendant that Never Was: ICAROM plc

Another defendant has repeatedly "creatively" used the removal process by removing cases in which it was not even named as a defendant (perhaps to secure advantage for fellow insurers who were actual defendants) in state court. In *Richard P. Ieyoub, Attorney General ex rel., State of Louisiana v. The American Tobacco Company, et al.*, No. 97-1174, W.D. La., the district court found that an entity not even named as a defendant, ICAROM plc, (formerly Insurance Company of Ireland) had injected into proceedings and was not authorized to remove the action. Since parties rarely voluntarily appear in court to be sued as defendants, the behavior was highly suspicious. Defendant status in the state court action sought to be removed is a fundamental prerequisite to a party's authority to remove. No disagreement exists in the cases on this issue. *E.g.*, *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954); *Ballard's Serv. Center, Inc. v. Transue*, 865 F.2d 447 (1st Cir. 1989) (§ 1446 authorizes removal only by defendants).

Any doubts about whether ICAROM's behavior in removing the action was an innocent mistake or a conscious effort to secure procedural advantage fades in light of its prior behavior. In *Aluminum Company of America v. Admiral Insurance Company*, No. 93-32C (W.D. Wash. 1993) (Rec. Excerpt No. 8 in *Ieyoub*, supra), ICAROM's attempt to remove a case to which it was not a party formed the basis for remand to state court. The court concluded that "ICAROM lacked standing to file the notice of removal." *Id.* at *1.

ICAROM injected itself into proceedings solely for the purpose of securing removal. This was unlikely to have been an innocent mistake. As an insurance company that frequently litigates in the United States, ICAROM cannot credibly deny knowledge of who may remove cases. It further strains credulity to argue that a sophisticated insurance company that participates in the London insurance market is unaware of the importance of precisely naming parties.

B. Systematic Evidence of Increasing Removal Abuse

Multiple wrongful removals in the same case, sometimes simply to delay trial, and removals by entities not even parties to cases appear to be just the tip of the iceberg of growing removal abuse. Preliminary results from research for an article by my colleague Trevor Morrison and me, to appear in the *Journal of Empirical Legal Studies*, suggest that the problem is more widespread and of increasing concern.

Defendants seem to be increasingly removing cases to federal court for the purpose of delay and to increase expense to plaintiffs. The evidence is that federal courts are increasingly having to remand removed actions to state court. The net result is a deadweight loss to the system–jockeying over where the case should be, and abusing

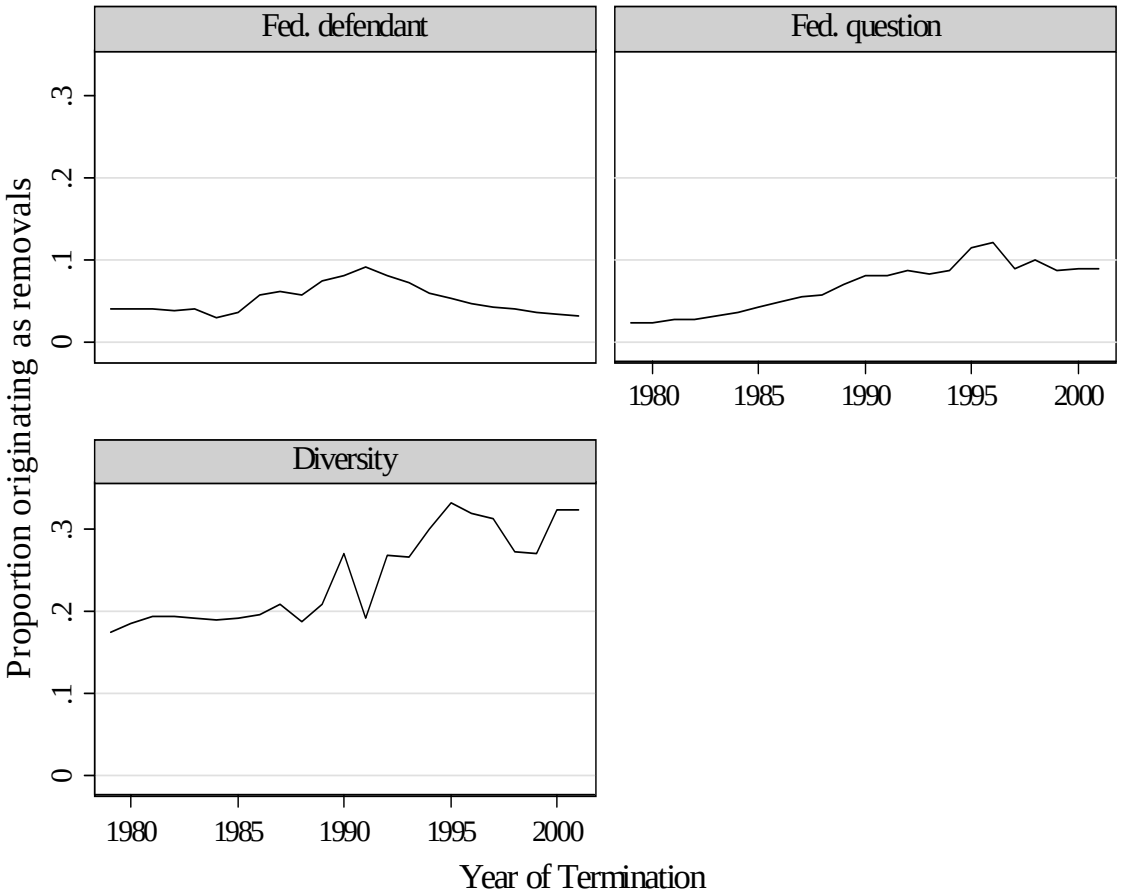

Figure 2. Proportion of Federal District Court Cases Originating as Removals from State Court, by Source of Federal Jurisdiction

mechanisms to choose forum, increases costs without furthering the progress of the litigation.

Summarizing the evidence of increasing removal abuse requires fitting together a few facts. First, tort filings are not up in state courts. The National Center for State Courts, the best source for information about state court filings, has found that, across 17 states from 1993 to 2002 tort filings have decreased 5%.[85] Across 35 states, tort filings decreased 4%.[86] Despite the shrinking pool of state-court filings, diversity-based tort removals from state to federal court have not noticeably declined. In 1993, 8,128 diversity tort cases terminated in federal court that had originated as removals in state court. In 2000, the last

[85] National Center for State Courts, Examining the Work of State Courts, 2003.

[86] Id.

full year for which numbers are readily publicly available, the number had held fairly steady at 8,030, a decline of about one percent. So a shrinking pool of state court tort cases has not resulted in a similarly shrinking pool of removed diversity csaes. Defendants are removing about the same number of cases despite shrinking state court tort dockets. As Figure 2 shows, the proportion of the federal docket originating via removal cases in increasing. In diversity cases, case origination in federal court as the result of a removal account for about 30% of the federal docket.

More importantly, the non-shrinking number of removals is accompanied by an increase in federal court remand orders. That is, remand rates are increasing over time. Figure 3 shows the increasing remand rate over time. In recent years, more than 20% of diversity tort cases removed to federal court have been remanded to state court. Such wrongful removal increases the costs to both sides, delays resolution of the matter for both sides, and is a deadweight loss to the system. As the anecdotal evidence suggests, some of these removals are repetitive and not well-founded. In one district where we have checked every removal by inspecting the docket sheets, when plaintiffs seek remand, the court finds the removal to have been erroneous in about 80% of the cases.

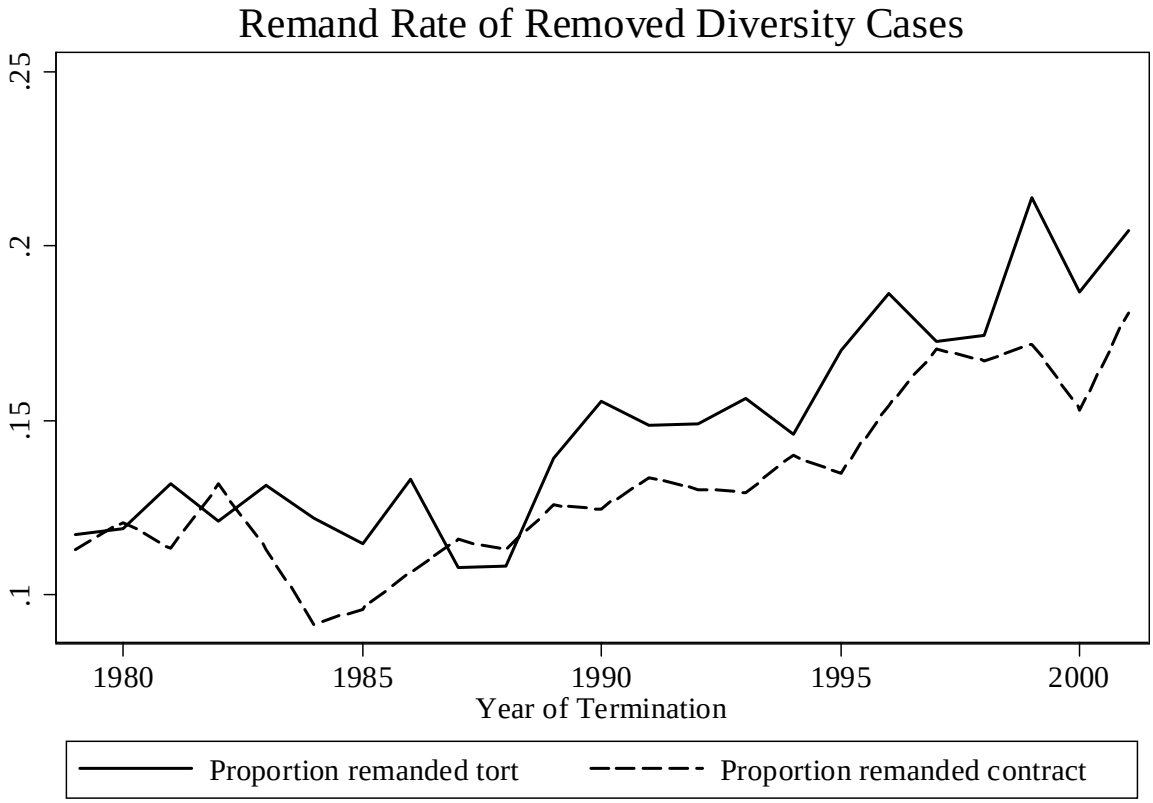

Figure 3. Remand Rate of Diversity Cases Removed to Federal Court Tort and Contract

The systematic and growing abuse of removal suggests an important area of litigation reform for this Committee to consider. This abuse is far better documented that unsupported assertions of claims of systematic litigation abuse.

Appendix

Theodore Eisenberg: Biographical Sketch

Theodore Eisenberg is the Henry Allen Mark Professor of Law at Cornell Law School. He graduated from Swarthmore College in 1969 and from the University of Pennsylvania Law School in 1972. He clerked for the U.S. Court of Appeals for the D.C. Circuit, and for Chief Justice Earl Warren (ret.). Before entering teaching, he practiced law in New York with Debevoise & Plimpton. He began teaching in 1977 at UCLA Law School, moved to Cornell in 1981 and has been a Visiting Professor at Harvard and Stanford Law Schools. He is a Fellow of the Royal Statistical Society, and a member of the Law and Society Association, the American Law and Economics Association, the American Bar Association, the Association of the Bar of the City of New York, the American Bankruptcy Institute, and the International Association of Procedural Law. He has been an NSF and ABF grantee and serves as a referee for many journals. He is founder and co-editor of the *Journal of Empirical Legal Studies*, serves on the editorial board of *American Law and Economics Review*, has served on the editorial board of the *Law and Society Review*, is Editor-in-Chief of the multi-volume treatise *Debtor-Creditor Law*, and is past Chair of the Law and Social Science Section of the Association of American Law Schools. He was elected to the Board of Directors of the American Law and Economics Association. Professor Eisenberg has taught bankruptcy and civil rights legislation for more than 20 years. He is the author of *Bankruptcy and Debtor-Creditor Law* (Foundation Press 3rd ed. 2004) (forthcoming), and *Civil Rights Legislation* (LexisNexis 5th ed. 2004), and *Konkurs eller Rekonstruktion* (SNS Förlag 1995). He is co-editor of *Commercial and Debtor-Creditor Law: Selected Statutes* and editor of *Civil Rights and Employment Discrimination Law:Selected Statutes and Regulations*. Professor Eisenberg's empirical studies of the legal system have appeared in many law reviews and books, and cover civil rights, finance, products liability, punitive damages, judge and jury trials, the death penalty, class actions, and litigation models.